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Court : Guwahati

Decided On : Nov-19-2003

Judge : D. Biswas and S.K. Kar, JJ.

Acts : Constitution of India - Article 226; Assam Forensic Science Laboratory Service Rules, 1995 - Rule 2, 12, 12(1), 13, 13(1), 13(2) and 13(3)

Appeal No. : W.A. No. 469 of 2002

Appellant : Apurba Kumar Sarma and ors.

Respondent : State of Assam and ors.

Advocate for Def. : K.R. Sharma, H. Das and K.C. Sharma, Advs.

Advocate for Pet/Ap. : B.K. Sharma, D.K. Sharma, U.K. Nair and U.K. Goswami, Advs.

Judgement :

1. Heard Mr. BK Sharma, learned senior counsel for the appellants and Mr. KP Sharma, learned senior counsel for the respondents.

2. This Writ Appeal is directed against the judgment and order dated 22.4.2002 passed by the learned Single Judge in WP(C) No. 5386/ 2000. The writ petition was filed by Sri Puspak Kumar Baruah for quashing the letter dated 24.5.2000 (Annexure-I) in so far it relates to the question of amendment of the Service Rules

and to hold the Departmental Promotion Committee meeting for consideration of his case for promotion to the post of Deputy Director, Biology Division in Forensic Science Laboratory. The learned Single Judge by the impugned judgment directed the State authority to consider the case of the petitioner for promotion under the existing Rules. In pursuance of this judgment, the petitioner (private respondent) was promoted to the post of Deputy Director (Biology) by the order dated 22.1.2003. The appellants who were not arrayed as respondents in W.P.(C) No. 5386/ 2000 have filed this appeal as the direction given in the writ petition is prejudicial to their interest. Their case is that they are senior to the private respondent and, therefore, should have been promoted before the private respondent in terms of the judgment in Civil Rule no. 3022 and 3013 of 1993 disposed of in 1996.

3. The impugned letter dated 24.5.2000 reads as follows :

With reference to above, I am to inform you that consequent upon the Judgment and Order of the Hon'ble Gauhati High Court on Civil Rule No. 3022 of 1993 Sri Bijoy Baruah v. State of Assam, the Government is actively considering the amendment of Rule 12 of Assam Forensic Science Laboratory Service Rules in respect of departmental promotion cases. Further, the ft has imposed certain conditions in the sanction of the upgradation of one post of Scientific Officer to that of Senior Scientific Officer for accommodating Sri P.K. Kalita to hold that post on promotion vide Government letter No. HMA.311/94/202 dated 15th March, 2000. One such condition is that till finalisation of the amendment of the Service Rules and Gradation List, the directorate of Forensic Science Laboratory will not take any step for further promotion of officers in the Forensic Science Laboratory.

In the light of above, your representation for promotion to the post of Deputy Director, Biology cannot be forwarded to the appropriate authority.

4. The impugned letter shows that the authority decided not to consider the appellants for promotion till amendments are carried out in pursuance of the judgment in C.R. Nos. 3022 and 3013 of 1993. The letter further shows that the State authority has been contemplating to amend the rules in pursuance of the direction given in the said Civil Rules disposed of on 27.9.1996. The learned

Single Judge while disposing of the said petitions, with reference to the proviso to Rule 12 which restrict promotion divisionwise, observed as follows :. Bearing in mind this general principles, governing the interpretation of a proviso, let us now examine the proviso to Sub-rule (1) of Rule 12 as quoted above. The general rule governing the promotion is stated in Sub-rule (1) which in turn refers to Rule 13 which provides for a general procedure of promotion and Rule 13(2)(b) clearly provides for the list of eligible officers for promotion in order of seniority to be prepared and furnished by the appointing authority for information. As regards the number of vacancies and the list of officers in order of seniority, eligible for promotion with separate list of promotion to different cadres to be furnished by the appointing authority further indicating the cadre to which the case for promotion is to be considered. The rule itself is reproduced below. Reading the proviso in juxtaposition with Rule 13(2)(b), the repugnancy between the two is apparent. It leads to conflicting results. In the same set of facts two different provisions have been made. It is riot merely a case of inconsistency but incompatibility as well. Had it been the intention of the rule makers to provide a scheme for promotion confined to particular division, there was nothing to prevent the authorities from suitably wording the Rule 13(2)(b) which speaks of list of officers in order of seniority eligible for promotion to different cadres and not different divisions as is sought to be contended by the respondents. Sub-rule (3) further provides that the appointing authority shall simultaneously request the Board to prepare and recommend a list of officers found suitable for promotion in order of preference in respect of a promotion to which all the cadres in which the recruitment is to be made by promotion. Except for the proviso, there is no reference to the term 'division' which again has not been defined under Rule 2, dealing with the definition of various terms.

5. Relying upon the judgements of the Hon'ble Supreme Court in O.Z, Hussein (Defendants-respondents.) v. Union of India, : AIR 1990 SC311 , Council of Scientific and Industrial Research and Anr. v. K.G.S. Bhatt and Anr. : (1990)ILLJ246SC and in Raghunath Prasad Singh v. Secretary, Home (Police) Deptt., Bihar, : (1988)IILLJ209SC , the learned Single Judge allowed the writ petitions declaring that the writ petitioners (appellants) were entitled to retrospective promotion. The direction given by the learned Single Judge was in

fact in suppression of the proviso which provided for divisionwise promotion contrary to the concept of cadre seniority as a whole as envisaged in the relevant Service Rules. The appeal has been preferred by the appellants who are working in the same Department relying upon this observation made by the learned Single Judge. The judgment delivered in the aforesaid Civil Rules has attained finality. It is on the ground Mr. B.K. Sarma, learned senior Counsel argued that merely because the Rules have not been amended, the proviso to Rule 12 cannot be applied and folowed contrary -to this decision. The promotion made subsequently as per provisions of the existing Rules is in violation of the above judgment and such illegality will not prevent the appellants in asserting their right for consideration for promotion in terms of the earlier judgment. The aforesaid judgment, Shri Sarma submits, has been followed by this Court in W.P.(C) No. 4240 of 1999 and in W.P.(C) No. 6430/2000 and promotions have been given on the basis of cadre seniority and not on the basis of divisional seniority.

6. There is no dispute that the judgment delivered by the learned Single Judge in C.R. Nos. 3022 and 3013 of 1993 has attained finality and has also been followed by this Court in two other writ petitions. Judicial propriety requires that decision rendered in Civil Rule Nos. 3022 and 3013 of 1993 and followed in subsequent two other writ petitions should normally be followed.

7. The learned Single Judge in the judgment under appeal rejected the prayer for direction to the State authority not to go for amendment of the Service Rules. There is no dispute at the bar that the Court should not in exercise of its powers under Article 226 direct the Government either to amend or not to amend any particular Rule. We are in full agreement with this view expressed by the learned Single Judge in the judgment under appeal. The Court under Article 226 cannot direct the State to exercise its legislative power in any particular manner.

8. With regard to the other direction for consideration of promotion of the private respondent, we may refer to the decision in B.L. Gupta and Anr. -v. M.C.D. : (1998)9SCC223 . The Hon'ble Supreme Court held-

9. When the statutory rules had been framed in 1978, the vacancies had to he filled only according to the said Rules. The Rules of 1995 have held to be

prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr. Mehta to a decision of this Court in the case of N.T. Devin Katti v. Karnataka Public Service Commission, In that case after referring to the earlier decisions in the cases of Y.V. Rangaiah v. J. Sreenivasa Rao, P. Ganeshwar Rao v. State of A.O. and A.A. Calton v. Director of Education is was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed. This being the correct legal position, the High Court ought to have directed the respondent to declare the result for 171 post of Assistant Accountants and not 79 which it had done.

9. In pursuance of the judgment under appeal the private respondent Shri P.K. Baruah has been promoted as Deputy Director (Biology), Forensic Science Laboratory by an order passed by the Secretary to the Government of Assam on 22.1.2003. The promotion is not in compliance of the earlier decision in C.R. Nos. 3022/3013 of 1993, but in keeping with the established general principle that promotion to the posts will be governed by the Rules in force when the vacancies occurred. The appellants claim that the private respondent being junior was not entitled to promotion, particularly because of the decision in the earlier judgment. There cannot be any dispute that the appellants ought to have been considered for promotion first in terms of the direction given in the earlier judgment after effecting necessary amendments. Situated thus, we are of the view that promotion made in accordance with the existing Rules need not be disturbed. The relief which can be extended to the appellants is that they would be entitled to promotion with effect from the date of promotion of their juniors with all financial benefits subject to suitability.

10. Hence, we dispose of the appeal at hand with the direction to the State Respondents to consider the case of the appellants for promotion to the next higher grade with effect from the dates when their juniors were promoted. Further,

it is desired that the repugnancy brought in by proviso to Rule 12 should be removed immediately in accordance with the earlier judgment in Writ Petition (C) No. 3022 and 3013 of 1993 by effecting appropriate amendment to avoid conflicting orders in future. Conflicting provisions in the Rules cannot co-exist for all time to come.

11. The writ appeal, accordingly, stands disposed of.

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